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SUBJECT: SHIN CORP DEAL IS LEGAL, SO WHAT?

1. (SBU) SUMMARY: Notwithstanding recent speculation on the front pages of Bangkok's newspapers that the Temasek Holdings takeover of Thailand's Shin Corporation will unravel, Embassy contacts universally expect the deal to go through when the tender offer is completed on Tuesday, March 14. Telecom sector analysts and attorneys regard the buyout as being in technical compliance with Thai law and practice. While the opposition continues to level a variety of charges against the transaction, the sole legal challenge to date focused on individual misconduct, and Thailand's Constitutional Court found insufficient evidence to hear a case charging Prime Minister Thaksin Shinawatra with violating conflict of interest law - effectively the same charge for which the court found him innocent when he was first elected PM in 2001. In what may be tacit recognition of the legal realities, the opposition has focused more on the ethics of the transaction. This issue underscores the critical need for strengthening the judicial and law enforcement institutions in Thai society, particularly with regard to their perceived impartiality and legitimacy. END SUMMARY

Speculation and Speculators

12. (SBU) Front page stories in papers like the Nation and the Bangkok Post have speculated during the past week that the takeover of Shin Corp by Singapore's Temasek Holdings (REF A) could be facing difficulties in the face of widespread public opposition to the deal and a drop in the Shin share price of about 8 percent in one day. Such public discussion of the 73-billion baht acquisition includes many voices, including, for example, those urging Temasek to halt the deal, others urging a boycott of products with a significant connection to Shin Corp or to Singapore, and still others seeking to use the issue to unseat Prime Minister Thaksin. Some market observers claim that the sudden decline in Shin Corp's share price to an 11 percent discount to the tender offer was, in fact, manipulation by speculators trying to scare minority shareholders into selling so that they could earn a quick profit. (Note: The SEC has thus far not investigated this unusual stock action. End Note.)

Nominees as Holding Companies

13. (SBU) Telecom analysts and attorneys familiar with the structure of the Temasek buyout have all expressed the view that it complies with existing law, and is not open to legal challenge regardless of how unpopular it may be - especially since the Shinawatra family has already received payment for its 49 percent share in the company. One telecom analyst who was asked to review the deal explained to Econoff that there is no record of a successful court challenge to the legal device used by Temasek to effect the deal, i.e., the use of alleged nominees in structuring purchases.

14. (SBU) The creation of nominee holding companies as majority shareholders in operating companies - in which stock with varying voting rights or the use of controlled investors is used to get around restrictions on foreign ownership regulations or other restrictions - is a very common practice in Thailand. As one lawyer told us, "There must be 10,000 nominee companies in Thailand, and virtually every businessman and lawyer of any consequence is involved with one." Even the restriction on foreign ownership of real estate (other than condominiums) is circumvented through the creation of a Thai nominee corporation as the beneficial owner of the property. Only in this way can the thousands of foreign real estate investors in Phuket enjoy their place in the sun. Thais also use nominees themselves to get around the requirement that any corporation have a minimum of seven shareholders. While it may be confusing to a westerner, this arrangement is a very "Thai way" of reconciling the political mandate of de jure restrictions on foreign ownership of things Thai versus the de facto desire/need for foreigners' money.

15. (SBU) That the jurisprudence is so supportive of the Temasek deal's legality is not surprising. The opposition's case, that the nominees do not count as a real owner, is almost impossible to prove: it requires that a party's status as a "non-owner" be set forth expressly in writing. The notifications filed with the RTG authorities in the Shin deal have not made such a declaration. Significantly, nominee status may not be inferred from such arrangements as unequal dividend splits or uneven division of voting rights. An attorney who has handled many such transactions explained

to Econoff that the customary practice to "prove" the bone fides of nominees is to require all shareholders to pay for their shares, as it appears the parties to the Shin deal did.
Derailment Fails

16. (SBU) Petitions lodged by over several civil society groups such as the Federation of Consumer Organizations (FCO), which launched a successful challenge to the partial privatization of the state-power producer EGAT Plc in November 2005, have failed to yield any result. The FCO and other organizations argued to the National Telecommunications Commission (NTC) that it should consider national security in relation to the Temasek deal, because it rendered Shin Corp-and subsidiary companies such as mobile provider Advanced Info Service, Shin Satellite, and broadcaster iTV-"alien" companies and in violation of Thai foreign ownership restrictions on telecom and media firms. The February 23 reply of the NTC essentially punted on the matter. The reply said that there is no clear evidence of any harm to national public services, and that it did not have sufficient information to inquire further into the complaints. The regulator did, however, request additional information so that it could consider whether or not any laws governed by the NTC were violated. In the view of the consumer organizations, the NTC did not exercise its full authority.

17. (SBU) To the extent that the Temasek deal has given rise to legal action, the focus has been on individual wrongdoing. On February 16, the Constitutional Court (by an 8 to 6 majority opinion) rejected a petition by 28 senators that the Prime Minister violated the conflict of interest law. "The petitioners did not state clearly how the Prime Minister was involved in managing the share trade deal." The Thai constitution forbids ministers from managing shares or affairs of a private company. Senators opposed to the Prime Minister have vowed to fight on, but have declined to say how. In retrospect, it is hard to see how the Constitutional Court could have reached a different judgment: the Senators' charge is effectively the same as that which the PM won in an 8-7 Constitutional Court decision back in 2001.

SEC bares teeth - Shows Gums

18. (SBU) On March 10, the Securities and Exchange Commission fined Panthongtae Shinawatra (age 27), the son of Prime Minister Thaksin, 5.98 million baht for two counts of disclosure violations and another 2.65 million baht for one violation of tender rules. Regulators said that Panthongtae had failed to properly report his total shareholdings in Shin, both directly and indirectly through the British Virgin Islands-based Ample Rich Investments, a firm set up by his father in 1999. Thaksin transferred control of the firm to his son in 2000. While consistent with precedent, the fines are well under the maximum penalties that could have been imposed, namely jail sentences of two years, fines of up to 500,000 baht, and additional fines of up to 10,000 baht per day. For one of his disclosure violations, for example, Panthongtae received a base fine of 127,500 baht, and an additional fine of 1,000 baht per day for the 3,197 days he was in violation of the law.
Checks, Balances, Something?

19. (SBU) Criticism of the Shin transaction has focused most closely on the fact that a transaction worth more than US\$1.8 billion was structured to incur no tax liability. The fact is, however, that the law clearly states that transactions made via the Bangkok Stock Exchange are not subject to tax. The Revenue Department similarly found that transfers of shares from the PM to his children and to his holding company (Ample Rich) were not taxable events because they were either gifts (and no cash was exchanged) in the case of the former, and the transfer was done at a price (below market) so that no capital gains were earned (in the latter case).

110. (SBU) The various institutions that were created by the 1997 constitution to act as a check on the power of parliament and the ruling party have failed to have any influence on the Shin Corp debate. The Constitution Court effectively punted, the National Counter Corruption Commission is still without the requisite number of commissioners (even if they had decided to hear a case). The Auditor General, whose tenure Thaksin tried to cut short only to have the King effectively block this action and have her re-instated, has done nothing because, according to her office, this is a private sector transaction and she deals only with the public sector (thus endorsing one of Thaksin's key assertions-that he personally had nothing to do with the deal). It is this ineffectiveness that Thaksin opponents say has driven them into the streets.

111. (SBU) In Singapore, Temasek Managing Director for Investment, S. Iswaran, acknowledged that the company was aware that investing abroad brought with it political risk, but emphasized that he expected the deal to be completed by March 14 in accordance with the rules of the Stock Exchange of Thailand. He reiterated that Temasek's investment in Shin Corp was a commercial decision that reflected its confidence in Thailand's long-term economic prospects. We note that Temasek concluded the purchase of all the shares from the PM's family in January, so that it has both a legal obligation to proceed with the transaction (per Thai SEC regulations) as well as an incentive to

secure a majority interest in Shin Corp.

112. (SBU) Comment: It seems almost certain that the Temasek buyout will go through because none of the opponents have presented a credible reason to block it. It is unlikely however, that completion of the deal will either quiet the political uproar over it or close the book on all charges of individual wrongdoing in connection with it.

113. (SBU) If there were credible evidence of clearly illegal aspects of the transaction, we are confident that the former investment bankers in the Democrat party (some of whom have made careers out of structuring such deals for wealthy Thais and worked for the same firm that provided financial advice to Temasek for the Shin transaction) would have identified and aggressively pursued them. The choice to make this an ethical rather than a legal issue is, we think, a practical one, determined by the weakness of the case (the opposition could lose, thus providing the deal with a clearer legal imprimatur that it has now), and Thais' greater faith in the precepts of Buddhist morality than the vagaries of the Thai justice system. If citizens had more confidence in their institutions (courts, regulators, bureaucrats), then their finding of no significant illegality in the Shin-Temasek deal would not be dismissed quite so quickly by so many Thais. Thaksin earns few political points for arguing the legality of the case - Thais know that "legal" here is a flexible term.

114. (SBU) The dismaying reality is that Thais don't trust the institutions involved (suspecting them to be either dismantled, bullied, or bribed into submission), so many Thais say "so what" to the statement that the transaction has been found to be legal. Above all, this issue underscores the need for a strengthening of the judicial and law enforcement institutions in Thai society, particularly with regard to their perceived impartiality and legitimacy.

BOYCE